In the Supreme Court of the United States

October Term, 1973

No. 73-556

FLORIDA POWER & LIGHT COMPANY,
Petitioner,

vs.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 641, 622, 759, 820 and 1263,
Respondents,

and

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF FOR FLORIDA POWER & LIGHT COMPANY

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OPINIONS BELOW

The opinion of the Court of Appeals, printed in the appendix to the petition for writ of certiorari[1], pp. 3-75, is reported at 487 F.2d 1143. The findings of fact, conclusions of law, and order of the National Labor Relations Board (A. Cert. 77-102) are reported at 193 NLRB No. 7.

JURISDICTION

The judgment of the Court of Appeals (A. Cert. 1-2) was entered June 29, 1973. Petition for Writ of Certiorari was filed September 27, 1973, and was granted on January 21, 1974 (A. 80). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

> Sec. 2. When used in this Act —
>
> * * *
>
> (3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor

[1]References to opinions printed in the appendix to the petition for writ of certiorari, not re-printed in the Single Appendix hereto, will be designated "A. Cert."

practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * *

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

* * *

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain

from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

* * *

Section 8. (b) It shall be an unfair labor practice for a labor organization or its agents —

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein, or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

* * *

Section 14. (a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

QUESTION PRESENTED

Whether the National Labor Relations Board properly found that a union violated Section 8(b)(1)(B) of the National Labor Relations Act by disciplining mem-

bers, who are Company supervisors, for crossing a picket line and performing Company work during an economic strike against the Company.

STATEMENT

A. Stipulated Record[2]

Florida Power & Light Company (hereafter Florida Power or Company) is a public utility furnishing electric power to customers in, broadly, the southern half of the State of Florida (A. 58). Since 1953 (A. 58), a collective bargaining relationship has existed between Florida Power and System Council U-4, representing eleven (11) Local Unions.

On October 22, 1969, the eleven Local Unions representing the Company's production and maintenance employees (A. 53-57) commenced an economic strike against the Company (A. 15). Picket lines were established and maintained at all, or substantially all, Company operational locations (A. 29). During the strike, which continued to December 29, 1969 (A. 29), supervisors who were members of the Respondent Local Unions, crossed the picket lines to perform work as required (A. 42).[3]

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[2]This matter was considered by the Board on a stipulation by the parties as to facts, issues, and documentary evidence, the parties waiving a hearing before, and decision by, a Trial Examiner. The stipulation appears at (A. 28).

[3]The stipulation before the Board provided that "the issue to be decided (by the Board) is whether Respondents' actions set forth in paragraphs number '12' and '13' of the Consolidated Complaint . . . violated Section 8(b)(1)(B) . . . " (A. 28). The action alleged was that supervisors "had crossed Respondents' picket lines and *continued to work for Employer*" and that sanctions had been imposed against the supervisors for that activity. The Board in its statement of

During January, February, and March, 1970 — after the strike had ended — the Respondent Local Unions commenced internal proceedings against those supervisors who had crossed picket lines and had performed work which, except for the strike, would have been performed by rank-and-file employees (A. Cert. 4; 9, fn. 13; 80-81). Those union-member supervisors who crossed picket lines, but performed no work usually reserved for rank-and-file employees were not made an object of union discipline (A. Cert. 9, fn. 13).

The charges by the Respondent Local Unions alleged that the supervisors had violated provisions of the International Brotherhood of Electrical Workers Constitution (A. 29-37), specifically working in an interest detrimental to, or for a company having difficulty with, the union (A. 76-77); subsections 3, 9, 10, 21 of Article XXVII, International Union Constitution.

Fifty-four (54) (A. 30-37) supervisors were thereafter fined in amounts up to $6,000.00 and/or expelled from Union membership. Further, by the expulsions, those expelled lost their entitlement to a Union sponsored death benefit fund and eligibility for Union pension benefits (A. 41). All those disciplined were supervisors within the meaning of Section 2(11) of the Act and possessed authority on behalf of the Company to adjust grievances and to act as Company representatives in matters of

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facts expanded the issue by finding that "supervisors routinely crossed the picket line during the strike and performed work, *including unit work*, for the Company" (A. Cert. 80-81). The Court of Appeals limited its consideration to "crossing a picket line and performing rank-and-file struck work during . . . a strike against the company" (A. Cert. 4; 9, fn. 13).

collective bargaining interpretations, although three of them supervised and adjusted grievances of non-bargaining unit employees only (A. 38-39).

B. The Board's Decision

On the stipulated record, the Board concluded (Member Fanning dissenting) that Respondent Unions had restrained and coerced the Company in the selection of its representatives for collective bargaining and adjustment of grievances, in violation of Section 8(b)(1)(B) of the Act, by imposing fines and other sanctions on those supervisors who had crossed picket lines and performed work, including bargaining unit work, for the Company (A. Cert. 83).

The Board, following its decisions in *Wisconsin Electric Power Company*, 192 NLRB No. 16, and *Illinois Bell Telephone Company*, 192 NLRB No. 17, reasoned that "the fines struck at the loyalty an employer should be able to expect from its representatives for the adjustment of grievances" — its supervisors — "and therefore restrained and coerced employers in their selection of such representatives" (A. Cert. 82).

C. The Decision of the Court of Appeals

In a 5-to-4 *en banc* decision, the court of appeals concluded that "(s)ection 8(b)(1)(B) cannot reasonably be read to prohibit discipline of union members — supervisors though they be — for performance of rank-and-file struck work" (A. Cert. 52). The majority opinion rejected the Board's conclusion and held that no violation exists unless the sanctions imposed upon supervisors were

imposed as a result of the supervisors' activity as a Company representative actually engaged in collective bargaining or in the adjustment of grievances (A. Cert. 20-24). The majority believed that "when a supervisor forsakes his supervisory role to do rank-and-file work ordinarily the domain of non-supervisory employees, he is no longer acting as a management representative and no longer merits any immunity from discipline" (A. Cert. 24-25) and "saying that rank-and-file labor is part of a management function is tantamount to saying that black is white" (A. Cert. 28).

The four-judge dissent rejected the majority view that when a supervisor performs rank-and-file work during a strike, he is doing something unrelated to his supervisory function. Rather, they reason that a supervisor who performs rank-and-file work during a strike is furthering the employer's interest by enhancing its bargaining position during that strike (A. Cert. 61). The dissent believed the majority was unwarranted in reversing the Board's conclusion that union sanctions imposed on supervisors would adversely affect their loyalty to their employers, regardless of the type of work they performed during a strike (A. Cert. 63).

ARGUMENT

I

The Board Properly Found the Undivided Loyality To Which An Employer Is Entitled Was Impaired By the Union Sanctions, and That Such Sanctions Violated Section 8(b)(1)(B) of the Act.

Following a review of the record, the Board found that Respondent Local Unions, by fining supervisors during the circumstances of a strike, had engaged in conduct violative of Section 8(b)(1)(B) of the Act [29 U.S.C. §158(b)(1)(B)]. The Act, Section 10(e) [29 U.S.C. §160(e)], provides:

> The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.

The determination of the facts and the inferences to be drawn from those facts is for the Board. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951); *Miami Newspaper Pressmen's Local No. 46 v. NLRB*, 322 F.2d 405 (C.A. D.C., 1963); *NLRB v. Local 369, International Brotherhood of Electrical Workers, AFL-CIO*, 341 F.2d 472 (C.A. 6, 1965).

We submit that the Board's findings are based upon substantial evidence in the record as a whole and have "a reasonable basis in the law"; [*NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 131 (1944)].

The Respondent Local Unions have disciplined over fifty individuals — all admittedly supervisors who supervise bargaining unit employees and who represent the Company in matters involving collective bargaining interpretation and adjustment of grievances — for their continued allegiance to their Employer during a strike.

The Board, with court approval, has applied Section 8(b)(1)(B) to a number of situations where union con-

duct tended to subvert the individual loyality an Employer has a right to expect from its supervisors. *San Francisco Oakland Mailers' Union No. 18*, 172 NLRB No. 252 (1968); *New Mexico District Council of Carpenters and Joiners of America*, 176 NLRB No. 105 and 177 NLRB No. 76, enforced *sub nom, NLRB v. New Mexico District Council of Carpenters and Joiners*, 454 F.2d 1116 (C.A. 10, 1972); *NLRB v. Toledo Locals, Lithographers and Photoengravers International Union, AFL-CIO*, 437 F.2d 55 (C.A. 6, 1971); *NLRB v. Sheet Metal Workers International Association, Local Union 49, AFL-CIO*, 430 F.2d 1348 (C.A. 10, 1970); *Dallas Mailers' Union, Local 142 v. NLRB*, 445 F.2d 733 (C.A. D.C., 1971); *Meat Cutters Local Union 81 of Amalgamated Meat Cutters of North American, AFL-CIO v. NLRB*, 458 F.2d 794 (C.A. D.C., 1972).

The differentiation made by the Court of Appeals and Respondent Local Unions between "supervisors' work" and "rank-and-file work" is a distinction without true substance. Thus, the allegiance required from a supervisor cannot be limited to performance of what is delineated as "usual supervisory functions", particularly in a strike situation. Indeed, supervison *is* management and *is* the employer, and must be expected to do all in its power to advance the lawful interests of the employer. ["The term 'employer' includes any person acting as an agent of an employer, directly or indirectly . . ." Section 2(2), Labor-Management Relations Act, 1947, as amended, 29 U.S.C. 152(2).]

Management should be — and we submit, is — entitled to the undivided loyalty of its supervisors ("It is natural to expect that unless Congress takes action, management

will be deprived of the undivided loyalty of its foremen." 1 Legislative History of the Labor-Management Relations Act, 411) and certainly that loyalty requires that the supervisors do whatever work is necessary in the best interests of management. That a strike situation may add to their duties, or alter their normal duties performed in behalf of management, cannot alter the protection afforded management by Section 8(b) (1) (B) of the Act.

The Court of Appeals and Respondent Local Unions concede that if supervisory work behind a picket line is confined to "usual supervisory functions", the supervisor is immune from discipline.[4] This distinction, we submit, is founded on neither law nor logic. Thus, those sections of the unions' International Constitution under which the sanctions were imposed (A. 75-76) make no distinction between supervisory work and rank-and-file work. If a union may not fine a supervisor for working behind a picket line when his work is confined to "usual supervisory functions" — as conceded by the Court of Appeals and the unions — then there exists nothing in the unions' Constitution or in the law which would permit the fines here in issue.

To conclude that the lawfulness or unlawfulness of a supervisory fine shall be controlled by the type of work the supervisor may have performed behind a picket line would, we submit, create an unrealistic situation. Thus, a determination of lawfulness would become a matter of degree. Did the supervisor spend one month during a

[4]"When a supervisor acts as such he is a representative of management, and as such, he should be immune from union discipline. The unions participating in the present cases conceded as much as (sic) oral argument when they agreed that when a supervisor crosses a picket line to perform *supervisory* work he remains immune from discipline." (A. Cert. 24) (Emphasis in original)

three-month strike doing rank-and-file work? Or was it one week, or one day, or one hour? Or did his "usual supervisory functions" include manual labor with a crew, or merely helping out in a plant emergency? We submit that neither law nor logic allows the determination of a violation of Section 8(b)(1)(B) to turn on the kind of work performed by a supervisor.

We submit that the fact the disciplined supervisors did perform bargaining unit work during the strike in no way excuses the restraint and coercion of the Employer proscribed by Section 8(b)(1)(B) of the Act. We further submit that the Board properly found that the Respondent Local Unions' conduct in disciplining supervisors, who adjusted grievances of, and supervised bargaining unit personnel, violated Section 8(b)(1)(B) of the Act.

II

Imposition Of Discipline On Company Supervisors Who Supervised Non-Bargaining Unit Personnel and Represented the Company In the Adjustment of Grievances of Such Personnel Violated Section 8(b)(1)(B) of the Act.

The record establishes, and the Board found, that Respondent Local Unions disciplined three Company supervisors, who supervised non-bargaining unit employees. These supervisors represented the Company in the adjustment of grievances of certain non-bargaining unit employees. These supervisors, like their counterparts who supervised bargaining unit employees, were disciplined for their continued allegiance to their Employer during the strike.

We submit there is no legal distinction between supervisors, who adjust grievances of and supervise non-bargaining unit personnel, and their counterparts, who adjust grievances of and supervise bargaining unit personnel. In this regard, the language of the Trial Examiner, adopted by the Board, in *Meat Cutters Local Union 81* 185 NLRB No. 130[5], is appropriate:

> The issue presented requires little added discussion, for the result is controlled by a number of Board decisions, holding, in substance, that a union violates Section 8(b)(1)(B) where it disciplines a member, who has responsibilities as a representative of the employer in administering a collective bargaining agreement or the adjustment of employees' grievances, because he performs duties as a management representative. It is of no moment that the collective bargaining contract makes no express provision for the participation of a supervisor such as Hall in the grievance machinery provided there, for Section 8(b)(1)(B) draws no distinction between a representative for the adjustment of grievances who functions under contractual grievance procedures, and one who does not.

It follows, we submit, that the discipline of non-unit supervisors for performing work in behalf of their Employer is at least as coercive as is the discipline of unit supervisors. *New Mexico Carpenters District Council of Carpenters and Joiners of America*, 176 NLRB No.

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[5]Enforced, *Meat Cutters Local Union 81, Amalgamated Meat Cutters of North America, AFL-CIO v. NLRB*, 458 F.2d 794 (C.A. D.C., 1972).

105 and 177 NLRB No. 76, *enf. sub nom, NLRB v. New Mexico District Council of Carpenters and Joiners*, 454 F.2d 1116 (C.A. 10, 1972). Thus, if a union may with impunity discipline supervisors wherever it finds them, such action would force the supervisors to adopt only those views and attitudes acceptable to the union throughout the entire Company organization. "Realistically, the Employer will have to replace its foreman or face de facto non-representation by them." *San Francisco-Oakland Mailers' Union No. 18, International Typographical Union*, 172 NLRB No. 252.

We submit the Board properly found that the Respondent Local Unions' conduct in disciplining non-bargaining unit supervisors who adjust grievances violated Section 8(b)(1)(B) of the Act.

III

Respondent Local Unions Improperly Disregarded The Provisions of The Collective Bargaining Agreement Expressly Prohibiting Union Discipline Of Supervisors.

At the time Respondent Local Unions imposed the discipline on Company supervisors, there was in effect a collective bargaining agreement containing a broad prohibition against disciplining supervisors " . . . for the acts they may have performed as supervisors in the Company's interest."[6]

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[6] "ARTICLE I

* * *

4.1 COMPANY-FOREMAN RELATIONSHIP

It is agreed that all promotions to and demotions from classifications in the wage bracket of Distribution Dispatcher (FL-WB) and above, as shown in Exhibit 'A', will not be subject to the arbitration

The previous collective bargaining agreement contained the identical provisions prohibiting union discipline against Company supervisory personnel (A. 60). Further, the collective bargaining agreement in effect, as well as its predecessor, contained a liberal grievance-arbitration procedure, which, *inter alia*, applies to ". . . any type of supervisory conduct which unjustly denies to any employee his job or any benefit arising out of his job . . ."[7]

Notwithstanding the existence of the aforementioned provisions of the collective bargaining agreement. Respondent Local Unions sought to restrain and coerce the Company by imposing union discipline on supervisory personnel. In *Meat Cutters Local 81 of Amalgamated Meat*

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step provided in the Agreement. It is further agreed that employees in such classifications have definite management responsibilities and are direct representatives of the Company at their level of work. Employees in these classifications and any others in a supervisory capacity are not to be jacked up or disciplined through Union machinery for the acts they may have performed as supervisors in the Company's interest. * * * (A. 60).

7 "ARTICLE IV
GRIEVANCES-CONFERENCES-ARBITRATION

26. GRIEVANCES DEFINED

A grievance is hereby defined as a violation of the terms of this Agreement or any type of supervisory conduct which unjustly denies to any employee his job or any benefit arising out of his job . . . " (A. 50-a)

"27. GRIEVANCE HANDING PROCEDURE

* * *

Fourth: Should any matter that has been referred to representatives of the parties, as provided in the third step above, not be satisfactorily adjusted within thirty (30) days from the date of such referral, either party may within sixty (60) days from date of such referral demand arbitration of the matter by giving written notice to the other . . . " (A. 50-b)

"28. ARBITRATION BOARDS — POWERS

(a) . . . the majority decision of the Board of Arbitration shall be final and binding on both parties hereto . . . " (A. 50-c)

Cutters of North America, AFL-CIO v. NLRB, 458 F.2d 794 (C.A. D.C., 1972), that court, under similar circumstances, pointed out that a labor organization, in choosing to ignore contract language and procedures, not only was violating Section 8(b)(1)(B) of the Act, but was also disregarding federal labor policy favoring resolution of union-employer problems through contract procedures.

The collective bargaining agreement expressly prohibited Respondent Local Unions from disciplining Company supervisors through internal union machinery. We submit that the existence of this express prohibition against union discipline vitiates any challenge to the Board's finding that Respondent Local Unions violated Section 8(b)(1)(B) of the Act.

CONCLUSION

The Company respectfully submits that the Board's findings are based upon substantial evidence in the record as a whole and have a "reasonable basis in law". *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 131 (1941).

The judgment of the court of appeals should be reversed and the case remanded with instructions to enter a decree enforcing the Board's order.

Respectfully submitted,

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March, 1974